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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 139

NATIONAL PLATE AND WINDOW GLASS COMPANY, INC.,
PETITIONER,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the District Court (R. 74) is not reported. The opinion of the Court of Appeals (Pet. 19-21) is reported at 254 F. 2d 92.

JURISDICTION

The judgment of the Court of Appeals was entered on April 7, 1958. (R. 79.) Rehearing was denied April 28, 1958. (Pet. 22.) The petition for a writ of certiorari was filed on June 30, 1958. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly held that taxpayer's filing of a petition in the Tax Court, opposing

the Commissioner's determination and praying for a redetermination of its liability with respect to the fiscal year 1953, did not foreclose an investigation of the taxpayer's liability for that year, pursuant to Section 7602 of the Internal Revenue Code of 1954.

2. Whether the Court of Appeals correctly held that a cursory inspection of the taxpayer's books and records for the fiscal year 1953, prior to the issuance of a summons for their production, did not bar their further examination, as either unnecessary, or as a second inspection, within the meaning of Section 7605(b) of the Internal Revenue Code of 1954.

STATUTES INVOLVED

Internal Revenue Code of 1939:

SEC. 272. PROCEDURE IN GENERAL.

* * * * *

(e) *Increase of Deficiency after Notice Mailed.*—The Tax Court shall have jurisdiction to redetermine the correct amount of the deficiency even if the amount so redetermined is greater than the amount of the deficiency, notice of which has been mailed to the taxpayer, and to determine whether any penalty, additional amount or addition to the tax should be assessed—if claim therefor is asserted by the Commissioner at or before the hearing or a rehearing.

* * * * *

(26 U.S.C. 1952 ed., Sec. 272.)

Internal Revenue Code of 1954:

SEC. 7601. CANVASS OF DISTRICTS FOR TAXABLE PERSONS AND OBJECTS.

(a) *General Rule.*—The Secretary or his delegate shall, to the extent he deems it practicable, cause officers or employees of the Treasury Department to proceed, from time to time, through each internal revenue district and inquire after and concerning all persons therein who may be liable to pay any internal revenue tax, and all persons owning or having the care and management of any objects with respect to which any tax is imposed.

* * * * *

(26 U.S.C. 1952 ed., Supp. II, Sec. 7601.)

SEC. 7602. EXAMINATION OF BOOKS AND WITNESSES.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing

entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry * * *.

(26 U.S.C. 1952 ed., Supp. II, Sec. 7602.)

SEC. 7603. [As amended by Sec. 4(i), Act of April 2, 1956, c. 160, 70 Stat. 87, and Sec. 208(d)(4), Federal-Aid Highway Act of 1956, c. 462, 70 Stat. 374]. SERVICE OF SUMMONS.

A summons issued under section 6420(e)(2), 6421(f)(2), or 7602 shall be served by the Secretary or his delegate, by an attested copy delivered in hand to the person to whom it is directed, or left at his last and usual place of abode; and the certificate of service signed by the person serving the summons shall be evidence of the facts it states on the hearing of an application for the enforcement of the summons. When the summons requires the production of books, papers, records, or other data, it shall be sufficient if such books, papers, records, or other data are described with reasonable certainty.

(26 U.S.C. 1952 ed., Supp. IV, Sec. 7603.)

SEC. 7604. ENFORCEMENT OF SUMMONS.

(a) *Jurisdiction of District Court.*—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the

district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

(b) [As amended by Sec. 4(i), Act of April 2, 1956, *supra*, and Sec. 208(d)(4), Federal-Aid Highway Act of 1956, *supra*]. *Enforcement.*—Whenever any person summoned under Section 6420(e)(2), 6421(f)(2), or 7602 neglects or refuses to obey such summons, or to produce books, papers, records or other data, or to give testimony, as required, the Secretary or his delegate may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

* * * * * *

(26 U.S.C. 1952 ed., Supp. IV, Sec. 7604.)

SEC. 7605. TIME AND PLACE OF EXAMINATION.

* * * * * *

(b) *Restrictions on Examination of Taxpayer.*—No taxpayer shall be subjected to unnecessary exami-

nation or investigations, and only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Secretary or his delegate, after investigation, notifies the taxpayer in writing that an additional inspection is necessary.

(26 U.S.C. 1952 ed., Supp. II, Sec. 7605.)

STATEMENT

The District Court made no findings of fact; nor did the Court of Appeals summarize the facts. As stated in the affidavits filed in connection with the motion to quash (R. 54-57; 64-71), the facts pertinent to this appeal may be summarized as follows:

Prior to April 3, 1956, Revenue Agent Irving Uberall and Special Agent Murray L. Waldman, both of the Internal Revenue Service, had been engaged in an investigation of the tax liability of Samuel Kirschner and Sons, Inc., a corporation closely allied to National Plate and Window Glass Company, Inc., hereafter referred to as the taxpayer. Herbert Kirshner and Alvin Kirshner, who were under investigation by Special Agent Waldman in their individual capacities, were the principal stockholders in both corporations. The taxpayer, a middleman, purchased glass from factories, and distributed it to its own purchasers. Samuel Kirschner and Sons, Inc., a contractor, bought glass from the taxpayer. (R. 65-66.)

The investigation of Samuel Kirschner and Sons, Inc., revealed that it and the taxpayer had engaged in some highly questionable transactions. On April 3, 1956, Special Agent Waldman, in order to substantiate the records of Samuel Kirschner and Sons, Inc., ob-

tained from the accountant for both corporations certain worksheets relating to the taxpayer's fiscal year 1953, which had been used in preparing the taxpayer's return for the fiscal year 1953, and which showed that some income transactions had been omitted in reporting the taxpayer's reported gross income, and that inventory figures may possibly have been juggled so as to report a lesser amount of gross profits. (R. 66.) [1]

On June 7, 1956, Special Agent James A. Duffy was assigned to investigate the taxpayer's liabilities. He was in charge of the investigation, working in cooperation with Special Agent Waldman and Internal Revenue Agent Uberall. (R. 70-71.)

On October 19, 1956, with the statute of limitations about to run on the taxpayer's liability for the fiscal year 1953, Revenue Agent Uberall requested the taxpayer to execute a Form 872 extending to June 30, 1958, the time within which an assessment could be made for the fiscal year 1953. By letter dated October 24, 1956, the taxpayer's attorney advised the District Director that the taxpayer desired the Internal Revenue Service to examine its books for the fiscal year 1953 prior to the expiration of the statute of limitations period. On November 14, 1956, one day before the expiration date, the Commissioner forwarded a 90-day deficiency notice to the taxpayer. Thereafter, the taxpayer filed a petition with the Tax Court contesting the proposed deficiency for the fiscal year 1953, and requesting redetermination of its tax liability for that period. (R. 55.)

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[1] On May 3, 1956, the United States District Court for the Southern District of New York denied the accountant's motion for return of the worksheets to his possession. This matter was not at issue below, and is not before this Court.

On January 14, 1957, in connection with the investigation of Samuel Kirschner and Sons, Inc., Special Agents Duffy and Waldman visited the taxpayer's premises, and photostated certain of its ledger accounts. On February 28, 1957, the taxpayer was investigated for the first time with respect to its own liability when Special Agent Waldman made a cursory inspection of its books and records for the fiscal year 1953. This was done for the purpose of determining if the taxpayer had "made a fraudulent return" and whether there was "civil fraud" or "criminal fraud". On March 4, 1957, a third party was questioned with respect to the taxpayer's liability; the questioning revealed that a fraudulent transaction had occurred. Four days later, Special Agent Waldman visited the taxpayer's premises, but was denied the right to inspect documents for the fiscal year 1953. The taxpayer's agents had scotch-taped the taxpayer's records for that period, making inspection impossible. (R. 64-66.)

On May 22, 1957, Special Agent Duffy served upon the taxpayer's president a summons to testify on June 4, 1957, concerning the taxpayer's liabilities for the fiscal years 1953 through 1956, and to produce certain designated books, records and papers of the taxpayer. (R. 72-73.)

The period for complying with the summons with respect to the fiscal year 1953 was extended, by oral agreement, from June 4, 1957, to June 12, 1957. (R. 51-52.)

On June 4, 1957, the taxpayer filed notice that it would move the United States District Court for the Eastern District of New York to quash the summons. With the notice of motion it submitted the affidavit of its president, Herbert Kirshner. (R. 50-57.)

At the hearing on the motion, the affidavits of Special Agents James A. Duffy and Murray L. Waldman, and of Revenue Agent Irving Uberall were submitted on behalf of the United States. The affidavit of Special Agent Duffy showed that the summons was issued by him in the performance of his official duties; that the action taken had been authorized by his superiors in the Intelligence Division of the Internal Revenue Service; that the summons was not issued at the behest of, or for the benefit of, any other agency of the Government; and that in his opinion, the use of the summons in the investigation of the taxpayer's liability was "material and necessary for a proper determination of the tax liability of National Plate & Window Glass Company, Inc." (R. 70-71.)

Special Agent Waldman's affidavit stated that there were "reasonable grounds to suspect and probable cause to believe that the Taxpayer has committed fraud". In reaching this conclusion, the affidavit stated that the agent had relied upon the following facts: (a) the close relationship between the taxpayer and Samuel Kirschner and Sons, Inc., and the revelation, as a result of the investigation, that there were "some highly questionable transactions transpiring between" the two; (b) the disclosure, from a check of the work papers of the taxpayer's accountant for the fiscal year 1953 that there were "specific business transactions of the Taxpayer which were not included in the Taxpayer's gross income" or in its return; (c) the further disclosure, from the same work papers, that there had been "a possible juggling of inventory figures so as to report a lesser amount of gross profits"; and (d) the steady increase in the taxpayer's gross sales for the period 1951-1955, inclusive, as shown in its returns, compared with the

marked decrease in its gross profits, as computed from the returns. According to the affidavit, the documents specified in the summons were "extremely important to the investigation"; without their production "further investigation of the civil and criminal fraud must be suspended"; they were "both material and relevant" to the investigation, since they were "necessary to reconstruct the financial history of the corporation, and to ascertain exactly what items were included or excluded in the Taxpayer's return which should not have been included or excluded". Further, according to the affidavit, the work papers of the taxpayer's accountant covering the fiscal year 1953, and the interrelationship of the stockholders of Samuel Kirschner and Sons, Inc., and of the taxpayer, indicated "an overpowering likelihood that some or all of the requested documents" would "bear heavily" upon determination of the taxpayer's possible "civil and/or criminal fraudulent liabilities". (R. 64-68.) Revenue Agent Uberail's affidavit contained similar allegations. (R. 69.)

On June 12, 1957, the taxpayer moved to quash the summons in its entirety in so far as it applied to the fiscal year 1953; and, in so far as it applied to the remaining fiscal years 1954, 1955, and 1956, the taxpayer (see Notice of Motion, R. 53) requested the court to quash that part of the summons which "demands all correspondence files, and memoranda of the National Plate & Window Glass Co., Inc. without specifying which files and memoranda are sought * * *." On June 27, 1957, Chief Judge Robert A. Inch granted the motion to quash (R. 74), "without prejudice to the Government's legal rights as to the * * * tax liability" of the petitioner. The Court of Appeals reversed, with a direction to deny the motion to quash and to enforce the summons. (Pet. 21; R. 79.)

ARGUMENT

1. In holding that the taxpayer was required to produce certain specifically designated categories of business records for the Internal Revenue Service's inspection in connection with its investigation of the taxpayer's liability for the four-year period to which the requested material related, the decision below correctly enforces the investigative authority conferred by Section 7602 of the Internal Revenue Code of 1954, *supra*, pp. 3-4. Section 7602 in effect provides that in order to ascertain the correctness of any return and to determine tax liability, the Secretary or his delegate is authorized to require any person to give such testimony and to produce such data as may be relevant or material to the inquiry. The right to investigate—a corollary of the duty imposed upon the Treasury Department by Section 7601(a) of the Internal Revenue Code of 1954, *supra*, p. 3—has been broadly construed. *Falsone* v. *United States*, 205 F. 2d 734, 742 (C.A. 5th), certiorari denied, 346 U.S. 864; cf. *Civil Aeronautics Board* v. *Hermann*, 353 U.S. 322. The only statutory restrictions upon that right are that no taxpayer shall be subjected to "unnecessary examination or investigations," and that except upon a taxpayer's request or upon written notice by the Secretary, "only one inspection of a taxpayer's books of account shall be made for each taxable year". Section 7605(b) of the Internal Revenue Code of 1954, *supra*, pp. 5-6.

The taxpayer did not contend below, nor does it now contend, that the books and records sought to be inspected are irrelevant or immaterial to the investigation of its liability. It does assert, however (Pet. 7-10), that as a matter of law the pendency of the Tax Court proceeding covering its liability for 1953 forecloses any further investigation as to that year by the Internal

Revenue Service; and that in any event (Pet. 11-12) further inspection of its 1953 records would constitute an unnecessary examination, and a second inspection, within the meaning of Section 7605(b).[2] Both contentions are without merit. As to the pendency of the Tax Court proceeding, concededly the Secretary or his delegate had no right to determine any additional deficiency for 1953 after the petition covering that year had been filed with the Tax Court. But, as the lower court correctly observed (Pet. 20), the Tax Court possessed the statutory power "to assess a deficiency greater than that originally determined by the Commissioner" (Section 272(e) of the Internal Revenue Code of 1939, *supra*, p. 2), and nothing in Section 272(e) "purports to restrict the subpoena power of the 'Secretary or his delegate' ", under the summons provisions of the 1954 Code, "to support the Commissioner's position *in the Tax Court*". (Emphasis supplied.) See also, *Bolich* v. *Rubel*, 67 F. 2d 894 (C.A. 2d); *Tax Liability of Norda Essential Oil & Chemical Co.*, 142 F. Supp. 868, 870-871 (S.D.N.Y.).

As to the alleged noncompliance with Section 7605(b), the record shows that one aspect of the prior inspection of the 1953 records was in connection with the investigation of another, though related, corporation. And in so far as any examination was made in connection with the investigation of the taxpayer's liability, it was, as the lower court noted, a mere (Pet. 20-21) "cursory examination * * * [which] was not shown to have com-

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[2] In the court below, the taxpayer contended, in addition, that the mandatory production of its records for the fiscal year 1953 would constitute a violation of its constitutional right to freedom from unreasonable search and seizure, and that some of the records sought to be inspected for all years had not been sufficiently identified in the summons and were not germane to the inquiry. These contentions have now been abandoned.

pleted the investigation", and thus "did not constitute an 'inspection' within the meaning of * * * [the] statute."

2. There is no conflict of decisions. The taxpayer's contrary assertion (Pet. 10-11) rests entirely upon its unwarranted conclusion that in the proceeding to enforce the summons the Commissioner had alleged fraud in the 1953 return "without any showing of reasonable cause for such belief". The record does not support this conclusion. On the contrary, the affidavit of Agent Murray L. Waldman set forth several specific (R. 66-67) " reasonable grounds to suspect and probable cause to believe that the Taxpayer has committed fraud". In any event, no issue as to the extent of the allegations of fraud prerequisite to enforcement of the summons was raised below, nor did the court below purport to lay down any governing rule in that respect. Taxpayer's assertion of conflict on this score (Pet. 11) is addressed to a straw issue.

CONCLUSION

The decision of the court below is correct, there are no conflicting decisions, and further review is not warranted. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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